No. 543

In the Supreme Court of the United States

OCTOBER TERM, 1951

ON LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 44-70) is reported at 193 F. 2d 306.

JURISDICTION

The judgment of the Court of Appeals was entered on November 21, 1951 (R. 432).[1] By order dated December 11, 1951, Mr. Justice Jackson extended the time for filing a petition for a writ of certiorari to and including January 19,

[1] The record in this case, designated by the symbol "R," is unprinted.

1952. The petition was filed on January 18, 1952, and was granted on March 3, 1952. The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the overhearing by a government narcotics agent, through the use of a radio receiver, of a conversation in the public room of petitioner's laundry between petitioner and a government employee who had a radio transmitter concealed on his person constituted an illegal search and seizure.

2. Whether the overhearing of the conversation constituted an interception in violation of Section 605 of the Federal Communications Act.

3. Whether the judgment of conviction should have been reversed because the court admitted testimony that after his arrest petitioner remained silent in the face of accusatory statements made in his presence, where the court gave a full exposition of the law on the subject in his charge to the jury and admonished them that, if petitioner had previously denied the accusation, his silence could not constitute an admission.

STATUTE AND CONSTITUTIONAL AMENDMENT INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against

unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 605 of the Act of June 19, 1934, 48 Stat. 1103, 47 U.S.C. 605, provides:

> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the

same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

STATEMENT

After a jury trial, petitioner was found guilty under both counts of a two-count indictment charging him with (1) selling opium in violation of 21 U.S.C. 173 and 174 and (2) conspiring with one Gong Len Ying and others unknown to violate various sections of the United States Code[2] relating to the possession of narcotic drugs (R. II-V). He was sentenced to three years' imprisonment on each count, the terms to run concurrently, and was fined $500 on the substantive count (R. 398).

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[2] 21 U.S.C. 173, 174, 26 U.S.C. 2553(a), and 26 U.S.C. 2554(a).

The Government's evidence may be summarized as follows:

On January 22, 1950, about 2:00 o'clock in the afternoon, Benny Gim, an undercover agent of the Bureau of Narcotics, was introduced to Gong Len Ying[3] at a coffee shop in New York City (R. 4, 19, 95). Gim asked Ying if he had any opium to sell, and Ying said that he could supply opium in any quantity at $550 per pound provided he was given sufficient notice beforehand. Gim said he wanted the opium that night, and while Ying at first said he could not get it so soon, he finally agreed to deliver it at 6:30 that evening. (R. 6; see also R. 94-96.)[4]

At 6:30 that evening Gim and Ying met at a previously designated street corner. Ying asked for the money, and Gim counted out $550 for a pound of opium. Ying thereupon told Gim to

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[3] Gong Len Ying, who is referred to in the testimony as Gong, and in the opinion below as Ying, will hereinafter be referred to as Ying. He was charged as a co-defendant, pleaded guilty to both counts of the indictment (R. II-V), and testified as a Government witness during the trial (R. 203). Ying's regular business was selling Chinese food to various laundries (R. 222).

[4] During this meeting, as during some of the subsequent meetings (R. 6-7, 25-26, 95; see also R. 16, 32, 34, 97, 98, 99), agent Gim carried on his person a miniature radio transmitter or microphone so that his conversations could also be heard by agent Lee who was stationed on the street nearby with a short-wave radio receiver in his brief case tuned in to the proper frequency. Both government agents took the stand and corroborated each other as to what was said during these conversations which transpired prior to the arrest of petitioner.

wait and he would return shortly with the opium. (R. 7.)

City detectives who were maintaining surveillance and Narcotics Agent L. J. Lee observed that Ying went to 15 Mott Street [5] and stayed there until about 7:00 p.m., when he left with petitioner (R. 97). The two men walked to 79 Mott Street and remained there for 20 to 25 minutes. Ying came out first, followed by petitioner a second or two later. They both stood on the sidewalk about half a minute, and then Ying walked back to the corner where he had met Gim (R. 7, 66-67, 97). Ying testified that at 15 Mott Street he gave petitioner the money he had received from Gim, keeping $70 as his own share, and that the two then went to 79 Mott Street, where petitioner gave him the opium wrapped in a Chinese newspaper (R. 204-205, 225-226).

On Ying's return to the corner, he handed Gim the package still wrapped in the Chinese newspaper (R. 7, 67, 97). Gim took the package to police headquarters where it was opened and found to contain a pound of opium. Ying was seen to return to 15 Mott Street after the transaction on the street corner (R. 67-68, 97).

On February 2, 1950, at about 7:30 p.m. Gim again met Ying. Gim told Ying that "the opium

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[5] Petitioner's Chinese family name is Eng (R. 201). The Eng family maintained rooms at 15 Mott Street (R. 132, 154, 225).

was fairly good" and that he wanted to buy 20 pounds. Ying at first said that he could not get such a large quantity on such short notice, but when Gim took a large roll of bills from his pocket and said he had $10,000 to pay for it, Ying said that he would call his partner. Ying then made a telephone call and on his return said that he was unable to reach his partner (R. 13-14). Gim asked Ying to visit the places his partner frequented and tell him that he, Gim, wanted the opium that night. Ying agreed to return at 10:30 p.m. and let Gim know definitely whether he could give him the opium (R. 14-15).

Officers followed Ying to Hoboken, New Jersey, and saw him visit three laundries there and then return to meet Gim (R. 70). At 10:30 p.m., Ying told Gim that he had been unable to reach his partner, and asked for more advance notice in the future (R. 15-16). He said also that had he had advance notice he could have obtained fifty pounds of opium (R. 16).

On February 9, about 7:30 p.m., there was, by prior arrangement, another short meeting between Ying and Gim at which Gim asked for twenty pounds of opium (R. 16-17, 47, 211). Ying replied that he could have the opium the following Sunday, February 12, and a meeting was arranged for 12:30 in the afternoon of that day (R. 17, 71, 98, 211-213). Ying testified that he thereupon called petitioner on the telephone and asked him whether

he had the opium.[6] Petitioner said he did not know whether he had any and he would see on Sunday, February 12, when they would meet at 15 Mott Street (R. 213-214).

On February 12, about noon, Ying met Gim and told him he "would see the man" about 1:30 p.m. and be ready to deliver (R. 17-18, 71, 99). Ying telephoned petitioner and went with him to a restaurant (R. 72, 83-84, 99, 215-217, 228-230). Ying testified that petitioner there said (R. 216): "I don't know whether or not we have any [opium]. If there is any money then we will talk." Ying then left petitioner in the restaurant, and rejoined Gim (R. 18, 72, 99, 231-234). Ying told Gim he would have to have the money before he delivered the opium. Gim refused to part with $10,000 without seeing and testing the opium first. Ying left, agreeing to talk with his partner and return in a few minutes (R. 18). He was seen by city detectives and Agent Lee to go back to petitioner in the restaurant and talk with him there in a booth (R. 72, 100). Ying went back and forth between Gim and petitioner three times and each time refused to deliver the opium until he received the money. Finally, seeing that further negotiations were futile, Gim gave the signal that there would be no transaction (R. 17-19, 51,

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[6] Petitioner, admittedly gave Ying his telephone number on a slip of paper at petitioner's laundry in Hoboken about a month before his arrest (Ex. 6, R. 201-203, 228, 271).

135). Ying returned to the restaurant where petitioner was waiting (R. 164-165).

City detectives arrested Ying and petitioner as they were walking away from the restaurant together (R. 73, 87, 101, 306). Petitioner was questioned by the city detectives and by the agent in English and Chinese (R. 52, 73, 89). He claimed that he did not know Ying, and had nothing to do with him (R. 73, 89-90, 303).[7] The next day, February 13, he was brought before a United States Commissioner for hearing (R. 61). Petitioner was then released on bail (R. 287).

On March 30, 1950, after the release of petitioner on bail, Agent Lee, together with a special employee of the Bureau of Narcotics, Chin Poy, went to petitioner's laundry at 1222 Washington Street in Hoboken, New Jersey (R. 103-104, 178-179), arriving about 2:00 o'clock in the afternoon (R. 178, 182, 191). Lee remained outside in the vestibule of a variety store, four doors away, where he operated a radio receiving set which he carried in a small briefcase (R. 181-183). Lee had a crystal conductor in his ear connected to the receiving set by a wire (R. 127, 182). There was no recording device affixed to the receiver (R. 196) and the set was rigged merely as a listening device.

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[7] At the trial petitioner explained the various transactions with Ying, including their meeting on February 12, as pertaining to the contemplated purchase of a wet wash laundry (R. 267-275, 282-286), although he testified that he never knew its address (R. 299).

Chin Poy, who carried a miniature radio transmitter on his person,[8] entered the laundry where he found petitioner (R. 104), who had been an acquaintance for 15 years (R. 292) and was Chin's former employer (R. 298). The laundry consisted of a large room and a storeroom. The storeroom had a counter in it with ironing tables behind that. There were separate living quarters in the rear of the laundry. There was a store window in front of the laundry (R. 191), and Chin Poy could be seen from the street as he stood in the laundry room (R. 181). Agent Lee, listening in on his receiver, heard Chin Poy engage in a general conversation with petitioner in Chinese about the gossip in Chinatown (R. 188-189). As Chin Poy and petitioner talked, customers would go in and out of the shop getting their laundry (R. 104). During the conversation, Chin Poy asked petitioner if the opium, which he was said to have according to gossip in Chinatown, belonged to him. Petitioner said no, that the opium which he had sold belonged to a syndicate of which he was the representative (R. 105-107, 188). Chin Poy then asked petitioner if he could place an order for a pound of opium. Petitioner said he could take an order as representative of the syndicate (R. 107-108).

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[8] The radio transmitter or microphone was carried in the inside pocket of Chin Poy's overcoat. A small antenna ran along the wearer's arm. It had a switch which could be turned on or off (R. 25-26).

At a subsequent meeting between Chin Poy and petitioner on April 2, 1950 on the sidewalk in front of 35 Mott Street in New York, Agent Lee again audited a conversation between the two in the same manner (R. 113-117). Petitioner admitted that he was the representative of the syndicate which owned the opium sold on January 22, that he employed "a truckdriver by the name of Gong [Ying]" to do the transacting and to sell his opium for him and "therefore he would not get into any trouble." He said "that the Government didn't have anything on him and he felt that he could beat the case" (R. 116-117).

Petitioner denied making any of the admissions that Agent Lee testified he heard on March 30 and April 2 (R. 292-299).

SUMMARY OF ARGUMENT

I

Petitioner contends that the overhearing by a government agent through the use of a radio receiver of a conversation voluntarily entered into between petitioner and a government employee who came into the public room of his laundry with a miniature pocket transmitter concealed on his person violated his constitutional rights. Although he raised no such contention on the trial, he now contends that the trial court should have excluded testimony relating to the contents of such conversation as the fruit of an illegal search and seizure.

There is, however, no basis for the application of this rule in the instant case. The mere use of an amplification device to overhear conversations is not itself a search and seizure, *Goldman* v. *United States*, 316 U.S. 129. Here, entry by Chin Poy into a public room was lawful and fully acquiesced in by petitioner. He did nothing which any member of the public could not legally have done. He conducted no search and made no seizure. The concealment on his person of a radio transmitter did not render his legal entry illegal. There was no element of trespass in any action of the government agents, and no behavior which in any way renders the admissions which petitioner was heard to make the fruit of an illegal search and seizure. There was no entry by the use of fraud, stealth, or duress, and no seizure of any evidence. There are, in short, none of the elements which could warrant a finding that the evidence in question was unlawfully secured and therefore inadmissible.

II

The overhearing by the use of a miniature radio receiver of a face-to-face conversation between petitioner and a government employee who carried a miniature radio transmitter on his person, is not the interception of a communication by wire or radio within the interdiction of Section 605 of the Federal Communications Act (*supra*, pp. 3-4). There was no "interception" within the meaning

of the Act because there was no mechanical interjection of a listening device into a federally-protected communications conduit. There is no support in the literal language or the history of the Communications Act for the proposition that it extends to the protection of face-to-face conversations. Other sections of the Act indicate that its policy is to safeguard the privacy of communications by wire or radio only. Clearly, the fact that the listening device itself was a miniature short wave radio does not establish a violation of Section 605. Auditing devices which are not themselves used for the transmission of radio communications do not come within the purview of the Act.

III

No prejudicial error resulted from the admission of testimony of an officer that while petitioner at first denied knowing Ying, his co-defendant, petitioner later remained silent while Ying gave a complete exposition of the involvement of both in the crime. When objection was made by defense counsel to this line of questioning, the court reserved its ruling on its admissibility. Later the court gave full and complete instructions to the jury addressed to this specific testimony, charging them that no admission made by Ying after the conspiracy had ended could bind petitioner. Also, he charged that if petitioner had once denied his involvement in the crime (which the witnesses testified he did)

the jury was to draw no inferences from his failure to repeat the denial when Ying made his accusatory remarks in his presence. The jury could not have been misled in view of the instructions of the court on the applicable law, which were at least as beneficial to petitioner as the circumstances warranted.

ARGUMENT

I

The Testimony of the Government Agent Relating to Conversations He Overheard Between Petitioner and Chin Poy Was Not Subject to Exclusion as the Fruit of an Unreasonable Search and Seizure Proscribed by the Fourth Amendment

Petitioner urges that the testimony of Agent Lee as to conversations he overheard between petitioner and Chin Poy should have been excluded under the rule of *Weeks* v. *United States*, 232 U.S. 383, as the fruit of an illegal search and seizure (Br. 17-36). He does not contend that the witness Lee ever entered petitioner's laundry or performed any act which could be considered a search or seizure. His contention is predicated on the fact that when Chin Poy entered the public room of petitioner's laundry, he had a radio transmitter concealed on his person, so that his conversation with petitioner was overheard by Agent Lee from his position four doors down the street. We submit, however, that there is in this case no foundation for the invocation of the *Weeks* rule.

There was here no search or seizure, and no trespass which would preclude the use of that which was heard.[9]

A. *The use of an amplification device to overhear conversations is not a search and seizure*

The decision of this Court in *Olmstead* v. *United States*, 277 U.S. 438, refusing to exclude evidence obtained by wire-tapping, established the proposition that the overhearing by a mechanical contrivance of a private conversation is not *per se*

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[9] Petitioner made no contention either before or at any time during the trial that there had been an illegal search and seizure. Defense counsel objected to the testimony in question solely on the ground that it related to another transaction not bearing on the crime charged (R. 104-108). On motion of defense counsel, the court instructed the jury to disregard any evidence relating to any transaction not included in the crime charged, and instructed that the conspiracy is presumed ended by arrest. (R. 109.) Later the court again told the jury that petitioner was not being tried for any offense committed after January 22 (R. 114). It did rule that an admission relating to the crime committed on January 22, 1950, could be allowed in evidence regardless of when it was made (R. 114). Defense counsel agreed with this ruling, but contended that the defense was prejudiced by other parts of the same conversation, revealing a later transaction not included in the indictment (R. 114-115). Although motions were made by the defense on conclusion of the Government's case, no mention was made of an illegal search or seizure (R. 244-258). Petitioner took the stand and admitted talking with Chin Poy for over an hour (R. 292-294), but denied any discussion regarding opium (R. 294-295). When petitioner was questioned on cross-examination by government counsel, defense counsel again objected to questions relating to the March 30 conversation on the ground that they sought to elicit evidence tending to prove the commission of another crime (R. 295-296). Although defense counsel made additional motions after closing testimony, no mention was made of evidence illegally obtained (R. 317-330).

The usual rule is that where a question of the legality of the

violative of the rights secured under the Fourth Amendment where otherwise there is no searching of an individual's house, his person, his papers, or his effects. That ruling, consistently followed by this Court (*Goldstein* v. *United States*, 316 U.S. 114, 120; *Goldman* v. *United States*, 316 U.S. 129, 135; see also *United States* v. *Dennis*, 183 F. 2d 201, 225 (C.A. 2), affirmed, 341 U.S. 494), applies here. Here, as in *Olmstead*, "we have testimony only of voluntary conversations secretly overheard." 277 U.S. at 464. "There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only." *Ibid.*

In *Goldman* v. *United States*, *supra*, as here, officers of the law employed a mechanical device to make a conversation audible beyond the confines of the place in which it was conducted. There, government agents overheard conversations of the

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procurement of tangible evidence is not raised before, or at least during, the trial, it is waived. *Segurola* v. *United States*, 275 U.S. 106, 111-112; *Landsborough* v. *United States*, 168 F. 2d 486 (C.A. 6), certiorari denied, 335 U.S. 826; *Cromer* v. *United States*, 142 F. 2d 697 (C.A. D.C.), certiorari denied, 322 U.S. 760. The trial court should at least have an opportunity to dispose of such a contention on its merits at some time during the proceedings. *United States* v. *Di Re*, 332 U.S. 581, 582. If petitioner's premise is assumed *arguendo*, that the Fourth Amendment protection extends to oral utterances, it follows that similar timely objection to testimony reporting such utterances should be required. At least it would seem that such an objection comes too late when, as in this case, it is not raised until oral argument on the appeal. For if there was anything in this case which might have been deemed a "search and seizure," its reasonableness was "in the first instance for the District Court to determine." *United States* v. *Rabinowitz*, 339 U.S. 56, 63.

defendants by means of a detectaphone affixed to the wall adjoining defendants' private office. In an effort to distinguish the *Olmstead* decision, the defendants argued to this Court that the employment of the detectaphone violated the Fourth Amendment because where "one talks in his own office, and intends his conversation to be confined within the four walls of the room, he does not intend his voice shall go beyond those walls and it is not to be assumed he takes the risk of someone's use of a delicate detector in the next room," 316 U.S. at 135. Rejecting this distinction and refusing to overrule *Olmstead*, this Court held that there had been no violation of the Fourth Amendment. In the present case, we submit, the effort to distinguish a detectaphone from a radio transmitter, both employed to make audible to outsiders speech presumably intended "to be confined within the four walls of the room," is "too nice for practical application of the Constitutional guarantee * * *." *Ibid.*

There was thus no search or seizure by use of the radio transmitter to overhear conversations either on the street or in the laundry. The word "search" connotes uncovering that which is hidden, prying into hidden places for that which is concealed. It is not a search to observe what is open to view. The Fourth Amendment does not forbid use of knowledge gleaned by the sense of hearing or sight. *McDonald* v. *United States*, 166

F. 2d 957, 958 (C.A. D.C.).[10] The rule has long been established that the eye cannot be guilty of a trespass. *Entick* v. *Carrington,* 19 How. St. Tr. 1029, 1066. This Court has held that the projection of a light onto private property, a ship, does not constitute a search where there is no exploration below decks or under hatches. *United States* v. *Lee,* 274 U.S. 559, 563. The same principle has been applied to the projection of light into a building, which has likewise been held not to constitute a search in the constitutional sense. *Safarik* v. *United States,* 62 F. 2d 892, 895 (C.A. 8); *Smith* v. *United States,* 2 F. 2d 715, 716 (C.A. 4). And the *Goldman* holding extended the principle to auditory impressions.

Clearly there was no seizure and no entry for the purposes of seizure. Where a defendant's own acts disclose incriminating evidence to law-enforcement officers there is no seizure, *Hester* v. *United States,* 265 U.S. 57, 58, even if words and impressions could be the object of seizure. And this Court in *Olmstead* v. *United States, supra,* said (277 U.S. at 466):

> Neither the cases we have cited nor any of the many federal decisions brought to our at-

[10] This part of the lower court's holding in the *McDonald* case was accepted *arguendo* by this Court in reversing the judgment of the court of appeals on the ground that a right of privacy secured to McDonald was abrogated by the forceful entry into his boarding house, followed by seizure without warrant of his property. *McDonald* v. *United States,* 335 U.S. 451, 454. And see *id.* at 458 (concurring opinion of Mr. Justice Jackson, in which Mr. Justice Frankfurter concurred).

> tention hold the Fourth Amendment to have been violated as against a defendant unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house "or curtilage" for the purpose of making a seizure.

No justification exists for enlargement of the words "search and seizure" so "as to forbid hearing or sight." *Id.* at 465.

Had Chiu Poy in the instant case concealed a camera on his person and snapped pictures of petitioner it could hardly be maintained that such pictures would be inadmissible. They would be as legitimate as his testimony telling what he saw. The concealment of a radio transmitter is no different in principle. In the first case a visual impression is carried off the premises; in the second case an auditory impression. Neither is the result of a "search."

Petitioner's contention that *Nueslein* v. *District of Columbia*, 115 F. 2d 690 (C.A. D.C.) extends the protection of the Fourth Amendment to vocal utterances of an accused as such is unfounded. In that case officers investigating a motor accident went to Nueslein's home and made an illegal entry without a warrant. Later, after the officers had "searched" for and found him on the second floor, Nueslein confessed to facts which incriminated him, and he was then placed under arrest. The Court of Appeals for the District of Columbia held

the confession inadmissible as being the fruit of an illegal search. The gist of the holding was that an illegal search was conducted by the officers' entry of a private dwelling without a warrant; the court did not hold that the search consisted of listening to the accused as he confessed to the crime. It was the search of his home within the interdiction of the Fourth Amendment which tainted his confession with illegality. The *Nueslein* case holds merely that, if the opportunity to overhear is the result of a trespass, the words overheard are inadmissible as the fruits of illegality. (Cf. *Goldman v. United States*, 316 U.S. 129, 134-135, where it was suggested that, if the detectaphone had been installed by means of a trespass the conversations overheard would not have been admissible. But cf. *Olmstead, supra,* at 465, and cases there cited, indicating that a trespass where there follows "no search of person, house, papers or effects" is in itself no ground for excluding evidence gleaned through sight or hearing.) The *Nueslein* case is not inconsistent with the principle established by the *Olmstead* and *Goldman* decisions that the overhearing of a conversation with or without the aid of a mechanical device is not a search and seizure within the meaning of the Fourth Amendment.

B. *There was no unlawful entry or trespass*

The foundation of the dissenting opinion below, upon which petitioner relies, is that the Govern-

ment committed a trespass into petitioner's "home" by sending Chin Poy into petitioner's laundry with a radio transmitter attached to his person. In this view, the testimony as to the overheard conversation between Chin Poy and petitioner which took place on the street was admissible, but testimony as to the overheard conversation which took place in the public room of the laundry was not. We submit that there is no basis for this distinction. Chin Poy's entry into the laundry with a radio transmitter concealed on his person was no more a trespass than Chin Poy's conversation with petitioner on the street.[11]

Chin Poy did not gain entrance into the public room of the laundry by force, by stealth or by virtue of any deceptive statements concerning the object of his visit. Entry was not effected under

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[11] Petitioner, arguing that the conversation between himself and Chin Poy on the street overheard by radio is unworthy of consideration here (Br. 34-35), contends that this conversation did not refer to the transaction of January 22, 1950, for which he was convicted, and that "no verdict of the jury could be claimed to be predicated upon" the testimony relating his admission on the street that he was an agent for a syndicate. If this suggestion were correct, there would be no basis at all for petitioner's present search-and-seizure argument since precisely the same admission—that petitioner was an agent for a syndicate—was overheard during his conversation in the laundry with Chin Poy, and it is testimony as to this admission which petitioner now attacks. In any event, our argument here is not concerned with the weight or the relevance (which petitioner has not urged for consideration by this Court) of the reported admission. What we seek to show is that, for purposes of the constitutional issue this case presents, the admittedly permissible testimony as to the conversation on the street differs in no essential respect from the testimony as to the conversation in the laundry.

color of office (cf. *Johnson* v. *United States*, 333 U.S. 10, 13), or by implied coercion (cf. *Amos* v. *United States*, 255 U.S. 313), or by stealth (cf. *Gouled* v. *United States*, 255 U.S. 298, 305-306), or by false representation of purpose (cf. *Fraternal Order of Eagles* v. *United States*, 57 F. 2d 93 (C.A. 3)). While Chin Poy concealed from petitioner the true reason for his visit, a passive non-disclosure of purpose does not render an otherwise legal entry illegal, *Warren* v. *Territory of Hawaii*, 119 F. 2d 936, 937 (C.A. 9). In short, there is absent in the instant facts any element of forceful entry, either actual or constructive. Cf. *Baxter* v. *United States*, 188 F. 2d 119, 120 (C.A. 6); *Love* v. *United States*, 170 F. 2d 32, 33 (C.A. 4), certiorari denied, 336 U.S. 912.

Chin Poy merely entered the open door of a public shop just as any other member of the public could legally do under the license implicit in the maintenance of such a public establishment. These premises, open to the general public, which were in fact visited by laundry customers who came and went during the conversation testified to, were not comparable to a private home (cf. *Nueslein* v. *District of Columbia*, 115 F. 2d 690 (C.A. D.C.)) or a private office (cf. *Goldman* v. *United States*, 316 U.S. 129). See *United States* v. *Rabinowitz*, 339 U.S. 56, 64; *Davis* v. *United States*, 328 U.S. 582, 593. Where premises are open to the general public, law-enforcement officers may legally enter without warrant, and if

they see incriminating evidence without ransacking the premises or otherwise conducting a "search," there is no prohibition against their testimony as to what they saw. *Smith* v. *United States*, 105 F. 2d 778 (C.A. D.C.); *Boyer* v. *United States*, 92 F. 2d 857 (C.A. 5); *Lawson* v. *United States*, 9 F. 2d 746, 747 (C.A. 7); *McWalters* v. *United States*, 6 F. 2d 224 (C.A. 9); *Ludwig* v. *United States*, 3 F. 2d 231, 232 (C.A. 7). An entry pursuant to invitation does not constitute a trespass so as to bring testimony derived thereby within the scope of the exclusionary rule. *Stein* v. *United States*, 166 F. 2d 851 (C.A. 9), certiorari denied, 334 U.S. 844; *Blanchard* v. *United States*, 40 F. 2d 904 (C.A. 5).

The dissenting opinion below concedes that the entry of Chin Poy into the premises was agreed to by petitioner (Pet. 62), but asserts that the concealment of the radio transmitter on Chin Poy's person constructively brought Agent Lee into the room, although physically he was four doors down the street. This precise contention was raised and rejected in the *Olmstead* case, petitioners there arguing (see 277 U.S. at 444):

> The effect of this trespass was to project themselves into the houses and offices of the defendants, with the same result as if they had broken through the windows or doors and secretly seized letters containing the identical messages that were transmitted over the 'phones.

Thus *Olmstead* destroys the foundation of the dissenting opinion below—that the use of the radio transmitter amounted to a trespass by the agent. And the substantial identity in operation and purpose between a detectaphone and a radio transmitter renders artificial the effort to distinguish the present case from this Court's *Goldman* decision.

In support of its trespass argument, the dissent below suggests (Pet. 61, 62) that the situation here should be viewed as if an agent had sneaked into On Lee's laundry and hidden in a closet or "as if the agent had been a midget and had been hidden in a bag carried by Chin Poy on to On Lee's premises." Without considering the result which might be required in such hypothetical situations, it seems sufficient to note that they would have been neither more nor less pertinent to the *Olmstead* and *Goldman* cases than they are here. For the fact is that the supposed cases involved in Judge Frank's dissent resemble this one—and *Olmstead* and *Goldman*—only in the sense that they suggest other methods of accomplishing the same result, of overhearing statements which are not intended to be overheard. And this Court's decisions show that legal means of obtaining evidence are not to be condemned because the same objective might have been achieved illegally. Looking through a window or throwing a searchlight on a boat may sometimes achieve the same result as an entry into a

building or a search of the boat. The use of detectaphones in the *Goldman* case accomplished the same result as the agents might have accomplished had they been able to hide behind some desks. But the legal effect is not the same. The question is, not what has been learned, but the means by which the information has been obtained. In the one case the element of trespass by government agents is manifestly present. In the other, although permissible artifice is employed, the trespassory element is absent.

Here there was no trespass by Chin Poy's entry. Had Chin Poy entered the laundry and conversed with petitioner without carrying a radio transmitter on his person, his activities would in no respect have constituted a trespass even though he concealed the fact that he was a government informer. Certainly Chin Poy could have testified as to what he himself heard, although he would have obtained the admissions by concealing his identity as a government agent. If Chin Poy could have succeeded in getting petitioner to talk loudly enough so as to be overheard by Agent Lee standing on the street or posing as a laundry customer inside the shop, the latter's testimony would not be subject to attack. The radio transmitter was a mechanical means of accomplishing that end. All that petitioner complains of here comes down to the fact that a man whom he considered a friend was a government informer. That, however, was

not a violation of petitioner's constitutional rights.[12]

It may be true that, lacking some such auditing device as was employed here and in *Goldman* and *Olmstead*, the Government's agents might have been unable to hear what they heard without committing a trespass. The important fact remains that there was no trespass in any of these cases and that the employment of artifice to apprehend those engaged in criminal enterprises is subject to no valid legal objection. *Sorrells* v. *United States*, 287 U.S. 435, 441. The use of decoys and other forms of deception is subject to no prohibition so long as there is no infringement of constitutional rights of the defendants, cf. *Grimm* v. *United States*, 156 U.S. 604, 610; *United States* v. *Dennis*, 183 F. 2d 201, 224-225; *United States* v. *Abdallah*, 149 F. 2d 219 (C.A. 2), certiorari denied, 326 U.S. 724; *United States* v. *Lindenfeld*, 142 F. 2d 829 (C.A. 2), certiorari denied, 323 U.S. 761. This Court in the *Olmstead* case, addressing itself to the contention that it should exercise its

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[12] This case is clearly distinguishable from *Gouled* v. *United States*, 255 U.S. 298, on which petitioner relies. In that case an entry by fraud was used to accomplish a violation of constitutional rights by a search without a warrant. Chin Poy did not enter surreptitiously as in *Gouled*; he merely failed to disclose the motive of his legal entry. In the *Gouled* case there was both a search and a seizure. In the instant case there was neither. *Gouled* clearly did not pronounce a rule that law-enforcement officers must recite their connection with crime detection before their testimony of criminatory admissions voluntarily made to them by an accused can be valid.

discretion to exclude evidence because it was "unethically secured", said (277 U.S. at 468):

> Nor can we, without the sanction of congressional enactment, subscribe to the suggestion that the courts have a discretion to exclude evidence, the admission of which is not unconstitutional, because unethically secured. This would be at variance with the common law doctrine generally supported by authority. There is no case that sustains, nor any recognized text book that gives color to such a view. Our general experience shows that much evidence has always been receivable although not obtained by conformity to the highest ethics. *The history of criminal trials shows numerous cases of prosecutions of oath-bound conspiracies for murder, robbery, and other crimes, where officers of the law have disguised themselves and joined the organizations, taken the oaths and given themselves every appearance of active members engaged in the promotion of crime, for the purpose of securing evidence. Evidence secured by such means has always been received.*
>
> A standard which would forbid the reception of evidence if obtained by other than nice ethical conduct by government officials would make society suffer and give criminals greater immunity than has been known heretofore. In the absence of controlling legislation by Congress, those who realize the difficulties in bringing offenders to justice may well deem it wise that the exclusion of evidence should be confined to cases where rights under the

Constitution would be violated by admitting it. [Emphasis added.] [13]

In short, the use of scientific devices to apprehend criminals—who are themselves able to take advantage of the many resources of modern technology—is in itself lawful and necessary as long as constitutional limitations are observed. The various situations envisaged in the dissenting opinion where mechanical contrivances are used to publicize conversations within a private home are unrelated to the instant case. As has been observed above, a private home is not here involved; the conversations transpired in a place to which the public was invited. In any event, if science should in the future perfect instruments which seriously invade truly private conversations, the validity of such developments may be considered as they appear. The present inquiry cannot be expanded beyond the relevant question as to whether, under the facts of the instant case, petitioner's constitutional rights have been abrogated in this instance.

This Court's *Olmstead* and *Goldman* decisions make it clear that the use of the transmitter in this case did not require rejection of the testimony

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[13] This language, it seems to us, answers petitioner's argument (Br. 39-42) that this Court, in the exercise of its supervisory authority to formulate rules of evidence to be applied in federal criminal prosecutions (*McNabb* v. *United States*, 318 U.S. 332), should exclude the evidence in question because of the deception employed in obtaining it. Clearly there was no compulsion against petitioner. Nor were there present any other elements—*e.g.*, threats or

proving petitioner's admissions. For Chin Poy's lawful entry into petitioner's laundry was no trespass and the overhearing of petitioner's statements was in no sense an unlawful search and seizure. There is no basis for invoking the rule of exclusion for there was no violation of any of petitioner's constitutional rights.

II

The Overhearing by Means of a Mechanical Listening Device of an Untransmitted Face-to-Face Conversation Does Not Constitute an "Interception" of a Radio or Wire Communication within the Meaning of the Federal Communications Act

Petitioner urges that the overhearing of the face-to-face conversation between himself and Chin Poy constituted an interception of a radio or wire communication within the meaning of Section 605 of the Federal Communications Act, 48 Stat. 1103, 47 U.S.C. 605 (*supra*, pp. 3-4).[14] As the court below held, however, the simple fact of this case is that (Pet. 45-46) "there was no 'interception' of a communication by wire or radio which is what the statute forbids. The radio device was merely a mechanical means of eavesdropping, just as the detectaphone was in the

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promises—touching the complete voluntariness of his statements to Chin Poy. The *McNabb* principle he invokes does not avail him. The rule of that case was premised upon the policy of legislation requiring the prompt arraignment of arrested persons and was designed to implement that policy. No such premise for petitioner's contention is present in this case.

[14] Like the contention based on the Fourth Amendment, this argument was raised for the first time on appeal.

Goldman case." Petitioner was in no remotely relevant sense a "sender" of a communication by wire or radio. He neither sent nor intended to send any message through one of the protected channels of communication. His only "communication" was made in direct conversation; the only "interception" was of this communication. The fact that this interception was accomplished by means of a radio device does not make of the conversation a communication by radio within the meaning of the Communications Act.

The futility of petitioner's reliance on that Act is amply demonstrated by this Court's *Goldman* decision. There, by means of a mechanical contrivance, a voice in the next office speaking into a telephone receiver was heard by government officers. Since the speaker in that case, whose voice was overheard, was using a protected means of transmission, there was—as there is not here—at least some superficially plausible basis for invoking the Communications Act. So the petitioners there contended that a communication falls within the protection of the statute once a speaker has uttered words with the intent that they constitute a transmitted telephone conversation. In rejecting this contention this Court said (316 U. S. at 133-134):

> The protection intended and afforded by the statute is of the means of communication and not of the secrecy of the conversation.

* * * * *

What is protected is the message itself throughout the course of its transmission by the instrumentality or agency of transmission. Words written by a person and intended ultimately to be carried as so written to a telegraph office do not constitute a communication within the terms of the Act until they are handed to an agent of the telegraph company. Words spoken in a room in the presence of another into a telephone receiver do not constitute a communication by wire within the meaning of the section. Letters deposited in the Post Office are protected from examination by federal statute, but it could not rightly be claimed that the office carbon of such letter, or indeed the letter itself before it has left the office of the sender, comes within the protection of the statute. The same view of the scope of the Communications Act follows from the natural meaning of the term "intercept." As has rightly been held, this word indicates the taking or seizure by the way or before arrival at the destined place. It does not ordinarily connote the obtaining of what is to be sent before, or at the moment, it leaves the possession of the proposed sender, or after, or at the moment, it comes into the possession of the intended receiver. The listening in the next room to the words of Shulman as he talked into the telephone receiver was no more the interception of a wire communication, within the meaning of the Act, than would have been the overhearing of the conversation by one sitting in the same room.

"Interception" is limited to taking or seizing by the way or before arrival at the destined place —some interjection between the termini of communication. *Goldman* v. *United States, supra; United States* v. *Lewis,* 87 F. Supp. 970, 974 (D. D. C.), reversed on other grounds, 184 F. 2d 394 (C. A. D. C.). It is not the message itself which the Act renders inviolable, but rather a protected channel of communication. Certainly petitioner, holding a face-to-face conversation with Chin Poy, was engaged in no communication of the kind safeguarded against interception.

No intent to protect private, untransmitted conversations can possibly be read into the clear language of Section 605. And even if the plainly expressed purpose of that language were at all ambiguous other sections of the Act remove any possibility of doubt. In Section 1 the overriding purpose of the Act of "regulating interstate and foreign commerce in communication by wire and radio" is pronounced. In Section 2(a) the Act is made to "apply to all interstate and foreign communication by wire or radio." In Section 3(a) and (b), "wire communication" and "radio communication" are defined. There is no support anywhere in the Act for the contention that Section 605 was framed to protect untransmitted conversations from eavesdropping devices, including radio transmitters. The history of the Communications Act of 1934 shows that its purpose was to extend to wire communications the prohibi-

tion against unauthorized publication of communications by radio.[15] There is no intimation of any intention to protect oral "communications" generally.

Petitioner seems to suggest (Br. 38-39) that the fact that the auditing device was itself a radio brings him within the purview of the Act. But the language of Section 605 cannot be interpreted to prohibit the use of such auditing devices. Employed as it was, this radio transmitter was no more a protected channel of communication than a detectaphone or a sensitive hearing aid would be. It was obviously not used for the transmission of radio communications within the meaning of the Act.

III

No Prejudicial Error Resulted from Admission of Testimony of Petitioner's Silence When His Co-Defendant Ying Made Accusatory Statements in His Presence After Arrest in View of the Court's Charge to the Jury

Petitioner also alleges as error (Br. 42 *et seq.*) the reception of testimony relating to his silence in the face of accusatory statements made in his presence by co-defendant Ying after the arrest. The facts, briefly, are these:

At the trial, Detective Monahan testified that, immediately after the apprehension of Ying and

[15] See Report No. 781, Senate Committee on Interstate Commerce, 73d Cong., 2d Sess., p. 11; Report No. 1850, House Committee on Interstate and Foreign Commerce, 73d Cong. 2d Sess., p. 9. See also *Weiss* v. *United States*, 308 U.S. 321, 328.

petitioner, they were kept apart and questioned. At that time petitioner denied knowing Ying (R. 73). Thereafter, Monahan testified, the two men were "booked" and taken to the Bureau of Narcotics, where they were put together in one room. At this point of the examination, defense counsel objected to any testimony as to what Ying had said after arrest as not binding on petitioner. The court, however, allowed Monahan to testify that, while petitioner at first denied delivering opium to Ying or having anything to do with him (R. 74), later, when Ying admitted receiving the opium from petitioner, petitioner remained silent and said nothing (R. 75). There was extended argument thereafter of the question whether testimony as to silence in the face of an accusatory statement is admissible (R. 75-80). The court reserved decision, and allowed cross-examination to proceed (R. 80). On cross-examination, Detective Monahan testified that petitioner "always denied" having any transaction with any opium (R. 90). Agent Lee also testified that petitioner denied that the opium was his (R. 103). When Ying was questioned by Government counsel as to what the detective had asked him, defense counsel objected (R. 219). Again there was argument as to whether silence in the face of an accusatory statement can constitute an admission (R. 219-222). The court allowed counsel to submit briefs on this point of law (R. 222) and it was not pursued further. After the Government had rested its case, defense counsel again

raised his objection to admission of the remarks of Ying after the arrest, and, following extensive argument (R. 244-255), the motion was denied (R. 255). However, in his instructions to the jury, the trial court told them that admissions and statements of a conspirator after the conspiracy has terminated do not bind a co-conspirator (R. 349); that after the arrest of the conspirators the conspiracy is terminated and no admission or statement made by a conspirator after the arrest binds a co-conspirator (R. 349-350); that the act or statement to bind a co-conspirator must be made by a conspirator while the conspiracy is in effect, in furtherance of the object of the conspiracy, and before its termination (R. 350). Later, the court instructed the jury (R. 360): "No admission made by Gong after the arrest can bind On Lee. I have already so charged, I think, fully." Then the court instructed the jury as follows (R. 360-362):

> I will charge the jury that if before the arrest the defendant made the statement to Monahan or any other agent that he did not make the sale, that he did not make the delivery, that he did not possess the opium, if he denied all that to Monahan or the other agents, and after the arrest in the presence of Monahan and possibly some of the other agents he was told or heard Gong saying, "you gave it to me; you delivered it to me," then under those circumstances the defendant On Lee could remain silent, and his silence would

not be regarded as tacit admission that he did so.

The general rule is that when a statement tending to incriminate one accused of committing a crime is made in his presence and hearing, and such statement is not denied, contradicted or objected to by him, both the statement and the fact of his failure to deny are admissible in a criminal prosecution against him, as evidence of his acquiescence in its truth.

Now I modify that by this consideration: if before the arrest he denied that he did it and then after the arrest in the presence of the people to whom he denied it, Monahan and the others, if in their presence he kept quiet when Gong told him "I got it from you; you delivered it to me," in that case I would say that silence did not constitute and acquiescence cannot be regarded as an admission, because having denied it before, he did not have to deny it again. There was a denial there and he did not have to tell the people to whom he already denied it that it was not so if the statement was made in his presence. He has denied it once and that would be sufficient.

The district judge correctly stated the general rule that testimony as to the silence of a defendant when confronted with accusations is admissible if made under such circumstances as would warrant the inference that he would naturally have contradicted them if he did not assent to their truth. This Court so held in *Sparf and Hansen*

v. *United States*, 156 U. S. 51, 56, and that decision has been followed consistently by the lower courts. *Egan* v. *United States*, 137 F. 2d 369, 380-381 (C. A. 8); *Seeman* v. *United States*, 90 F. 2d 88, 90 (C. A. 5); *Rocchia* v. *United States*, 78 F. 2d 966, 972 (C. A. 9); *Dickerson* v. *United States*, 65 F. 2d 824, 826-827 (C. A. D. C.); *Graham* v. *United States*, 15 F. 2d 740, 742-743 (C. A. 8). Wigmore states the rule as follows (4 Wigmore, *Evidence* (3d ed., 1940), Section 1071, p. 74):

> * * * It would seem to be better to rule at least that any statement made in the party's presence and hearing is receivable, *unless* he can show that he lacked either the opportunity or the motive to deny its correctness; thus placing upon the opponent of the evidence the burden of showing to the judge its impropriety. But the burden is in practice generally left upon the proponent to show that the requisite conditions existed; though the middle course is sometimes taken of leaving the question to the jury [footnotes to supporting decisions omitted].

The applicability or nonapplicability of the rule is conditioned on whether the circumstances are such that one would in the natural course of human behavior contradict accusatory statements made in his presence implicating him in a crime. Acquiescence in the truth of a statement clearly may be proved by a course of action as well as by words of agreement. And silence is as probative

under certain conditions as verbal admissions would be. Of course, circumstances may exist to negative any inference which might otherwise be raised by the silence of an accused in the face of accusations of his accomplice. For example, as the court instructed the jury in this case, if an accused has once denied his implication in the crime, no presumption arises by reason of his failure to rebut further accusations of his accomplice. Many other factors may likewise forbid the inference. See 4 Wigmore, *Evidence* (3d ed., 1940), Section 1072.

This Court has held admissible evidence that an accused defendant remained silent when confronted with an accusatory statement even where the defendant was under arrest at the time such statement was made. *Sparf and Hansen* v. *United States*, 156 U. S. 51, 56. The same view has been announced in lower court decisions (*Dickerson* v. *United States*, 65 F. 2d 824, 826, 827 (C. A. D. C.); *Rocchia* v. *United States*, 78 F. 2d 966, 972 (C. A. 9)), as well as by Wigmore, whose treatise states (4 Wigmore, *Evidence* (3d ed., 1940), Section 1072, pp. 80-81):

> Certain situations in particular may furnish a positive motive for silence without regard to the truth or falsity of the statement. Whether the fact that the party is at the time *under arrest* creates such a situation has been the subject of opposing opinions; a few Courts (for the most part in acceptance of an early

> Massachusetts precedent), by a rule of thumb exclude the statement invariably; but the better rule is to allow some flexibility according to circumstances [footnote to supporting decisions omitted].

On the other hand, as petitioner points out (Br. 47), other courts, including the court below, have held that where an accused is under arrest, his failure to deny an accusatory statement may not be used as a basis for inferring his guilt. At the very least, this state of the authorities makes wholly understandable and proper the delay of the trial judge in this case in ruling finally on the admissibility of the testimony in question. And even assuming, as the court below did, that the initial admission of such testimony was erroneous, the district judge's charge to the jury left no basis for the present contention that petitioner was prejudiced. For the charge effectively removed this testimony from the jury's consideration.

In substance the district judge charged that if petitioner had once denied his guilt, no inference against him was to be drawn from his failure to repeat the denial when confronted with the accusatory statement of his accomplice. It is true, as the dissent below points out (Pet. 68-69), that in referring to the denial which would make subsequent denials unnecessary, the trial judge described it as one made "before the arrest." It is clear, however, both from the undisputed evidence before the jury

and from the remainder of the trial judge's comprehensive charge on this issue, that the jury could not have been misled into supposing that this phrase referred to some time before the apprehension of petitioner and his accomplice by the officers. In his charge the trial judge explicitly referred to denials addressed to the officers; and it was clear from the evidence that there had been no contact between petitioner and the officers until after his apprehension on the street.

The record shows that petitioner was questioned on two separate and distinct occasions—once before and once after his booking at a local police station. Prior to the booking, when he was questioned alone, he denied any implication in the crime. After the booking, when he was questioned in the presence of his accomplice, he repeated the denial (R. 74). It was at this point, immediately following petitioner's second denial of guilt, that he remained silent when his accomplice's accusatory statement was made.

In these circumstances, there is scarcely room to doubt that the jury understood petitioner's denial prior to his booking to have rendered unnecessary any further denial when his accomplice later in his presence implicated him. We think the necessary conclusion of both judge and jury was stated at the conclusion of the charge (R. 361-362): "There was a denial there and he didn't have to tell the people to whom he already denied it that it was not so if the statement was made in

his presence. He has denied it once and that would be sufficient."

The court below was clearly correct in concluding that neither the colloquies between counsel and the trial court nor the initial admission of his co-defendant's accusatory statements prejudiced petitioner. As to legal arguments during the trial, the courts have necessarily and properly recognized that such discussions of the rules of evidence are not ordinarily regarded by a jury as serious matters or of much concern to them. *Fredrick* v. *United States*, 163 F. 2d 536, 548 (C. A. 9), certiorari denied, 332 U. S. 775; *Goldstein* v. *United States*, 63 F. 2d 609, 613 (C. A. 8). The question involved clearly warranted the court in reserving its decision, and any possibility of prejudice was erased by the instructions.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment of the court below should be affirmed.

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